91-1598

Supreme Court, U.S.
FILED
FEB 19 1992
OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

HIROTOSHI YAMAMOTO,
Plaintiff-Appellant
and
SHIZUKO YAMAMOTO,
Plaintiff

vs.

THE UNITED STATES
Defendant-Appellee

Federal Circuit
No. 91-5113

U.S. Claims Court
No. 701-89 T

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF
CERTIORARI

HIROTOSHI YAMAMOTO, pro se
1050 — 12th Ave.
Honolulu, Hawaii 96816
Phone: (808) 696-8531
For Plaintiff-Appellant

QUESTIONS PRESENTED

1. Did the lower court err in its denial of jurisdiction because of its erroneous characterization of Plaintiff's action as a "Claim for Refund", rather than the correct description as a Petition for Redress of a breach of Plaintiff's Constitutional right to "due process" under the Fifth and Fourteenth Amendments to the United States Constitution?

2. Did the lower court err in its failure to recognize and cite Defendant (IRS) for its patent breach of prevailing statutory provisions designed to insure "due process", in its processing of the recovery collection of an alleged erroneous "overpayment" of a refund to Plaintiff?

3. Is it illegal and capricious to use 26 U.S.C. §7422(a) (1986) as a carte blanche license to "pluck clean" Plaintiffs of any and all assets to insure their inability to engage legal counsel to represent them?

4. Is it illegal and capricious to use 26 U.S.C. § 7422(a) (1986) as an all pervasive requirement, notwithstanding other prevailing statutory provisions?

5. Should the judgement of the Tax Court as to the total additional assessments due and payable be amended and reduced to reflect the excluded exculpatory evidences, as admitted in a recent corrected statement by the IRS?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions and Decisions Below	1
Concise Statement of This Court's Jurisdiction	2
Concise Statement of the Case	3
ARGUMENT	
I. Claim for Refund Is A Misnomer	4
II. Defendant (IRS) Patent Breach of "Due Process"	5
III. Carte Blanche Seizures Should Not Be Allowed	6
IV. Claim for Refund Cannot Be An All Pervasive Requirement	7
V. Exclusion of Exculpatory Evidences — A Patent Denial of Due Process	8
SUMMARY ARGUMENT	9
Conclusion	10
APPENDIX	11
AFFIDAVIT OF SERVICE	27

TABLE OF AUTHORITIES

	Page
ALASKA SALES AND SERVICE, INC. v. MILLER, ALASKA 735 P 2nd 723, 724	4
FIFTH AND FOURTEENTH AMENDMENTS to the UNITED STATES CONSTITUTION	i, 2, 5, 10
26 U.S.C. § 7422(a) 1986	i, 1, 2, 6, 7, 10
28 U.S.C. § 210(c)	2

OPINIONS AND DECISIONS BELOW

April 29, 1991 No. 701-89

In the United States Claims Court

Order of BRUGGINK, Judge

Plaintiff's Complaint was dismissed: (1) failed to "duly file" a refund claim, (2) failed to pay the tax due with respect to the 1979 tax year, and (3) failed to wait until the Tax Court decision became final before filing the present suit.

November 22, 1991 No. 91-5113

In the United States Court of Appeals for the Federal Court

Before MAYER, RADER, Circuit Judges and COWEN, Senior Circuit Judge

DECISION

Hirotoshi Yamamoto appeals the judgment of the Claims Court in No. 701-89T, dismissing his income tax refund suit for lack of jurisdiction because he did not file a timely claim for refund under 26 U.S.C. § 7422(a)(1986). We affirm on the basis of the trial court's order of April 29, 1991.

CONCISE STATEMENT OF THIS COURT'S JURISDICTION

1. The Statutory Provision, 28 USC § 210 (c) is believed to confer on this court, jurisdiction to review the judgment in question of the lower courts by Writ of Certiorari.

2. Where it is patently clear that the lower court's judgment has created extensive conflicts and contradictions between prevailing statutory provisions, in addition to the ignoring of Plaintiffs' right to "due process", the Writ of Certiorari is mandatory to resolve such created conflicts, contradictions, and the Constitutional denials.

3. Where the District Counsel of the local IRS has willfully and capriciously withheld exculpatory evidences for nefarious reasons, which excluded evidences would have reduced the total amount of the addtional assessment due and payable, Certiorari must lie to correct the impaired judgment of the Tax Court, and to rectify the denial of Plantiffs' Constutitional right to "due process" under the Fifth and Fourteenth Amendments to the United States Constitution.

4. The request for this Court's ultimate review for redress of a breach of Constitutional guarantees, is not an action which is based on a "privilege" which may be denied for expediency, but a "right" which must be honored expeditiously.

5. Certiorari must lie where the Secretary has not established, and/or enforced definitive restraints and limitations to prevent abuse of the liberal grant of power to the IRS under 26 U.S.C. § 7422(a) (1986), the constitutionality of which is now in serious askance.

CONCISE STATEMENT OF CASE

1. Taxpayers filed 1978 Return (1040) on May 15, 1979.
2. Taxpayers filed 1979 return (1040) on April 15, 1980.
3. In 1982, plaintiffs filed an "Application for Tentative Refund" (1045) for 1981 loss of $196,882.99, carryback to 1978, 1979, 1980 (Exhibit A)
4. Plaintiffs received check from IRS for loss carryback of $91,845.45, including interest of $47,388.09 (Exhibit B)
5. On September 9, 1987 plaintiffs filed Amended 1940X for 1985 for Involuntary Conversion Loss of $3 million plus (Exhibit C)
6. Both the 1978 and 1979 returns were audited. Planitiffs contested IRS findings of additional assessments for both years.
7. Tax Court returned deficiencies against Petitioners on August 10, 1987 as follows:

1978	$76,800.35
1979	42,565.06
Total	$119,365.41

   Taxpayers appealed decision.
8. Ninth Circuit Court of Appeals affirmed Tax Court decision on December 1, 1989 (Exhibit D)
9. Case filed in U.S. Claims Court on December 28, 1989.
10. U.S. Claims Court affirmed lack of jurisdiction decision on April 29, 1991. (Exhibit E)
11. Plaintiffs appealed decision to U.S. Court of Appeals for Federal Circuit.
12. On August 19, 1991 IRS Notice of Correction of 1978-1979 taxes. (Exhibit F)
13. Federal Circuit Court of Appeals affirmed Claims Court decision on November 22, 1991. (Exhibit G)

ARGUMENT

I.

CLAIM FOR REFUND IS A MISNOMER

1. The lower court's characterization of Plaintiff's action as a "Claim for Refund" is a misnomer. The cause of Plaintiff's action is the denial of their Constitutional right to "due process". The refund or restitution sought is the partial remedy for the breach and denial of the Constitutional guarantee. For restitution is not a cause of action, but a remedy. Alaska Sales and Service, Inc. v. Miller, Alaska 735 P2nd 723, 724.

   Therefore the lower court's denial of jurisdiction based on the failure to duly file Claim for Refund should, ipso facto, be reversed.

II.

DEFENDANT (IRS) PATENT BREACH OF "DUE PROCESS"

Opinion of Lower Court, pg. 2, line 28.

> "subsequent to the issuance of those refunds, the IRS determined that allowance of the carryback was erroneous, and, in effect, cancelled the prior abatement. (Underscore supplied.)

2. The IRS had honored taxpayers' "Application for Tentative Refund" (Form 1045) with a refund check. The "in effect cancellation" accepted by the lower court, was an immediate seizure of all balances in taxpayers' bank accounts. This was done without "due process".

3. Admittedly, the IRS refund executed was "Tentative". The IRS has three years to correct any alleged error. However, such correction must be in compliance with "due process" or the issuance of a ninety day letter of intent to levy and all that follows.

4. The immediate seizures by IRS District Counsel without the 90 day letter is contrary to statutory provisions for the insurance of "due process."

5. The lower court had erred, first, in not recognizing a blatant breach of taxpayers' Constitutional right to "due process" under the Fifth and Fourteenth Amendments to the U.S. Constitution. And, secondly, to compound that error, the lower court, sanctimoniously accepted, condoned and cited that breach as a basis for its decision to deny jurisdiction.

III.

CARTE BLANCHE SEIZURES SHOULD NOT BE ALLOWED

6. It is evidentially clear that Defendant (IRS District Counsel) had used 26 U.S.C. § 7422(a)(1986), with its liberal waivers of overt and wrongful collections, as a license to "pluck taxpayers clean" (using his own description) and to assure the "safety" of his actions which resulted in taxpayers' inability to engage legal counsel to file a timely Claim for Refund.

7. Should 26 U.S.C. § 7422(a)(1986) be so construed, by practice or legal interpretation, as granting such Carte Blanche license to the IRS, which grant strikes at the very heart of our Constitutional guarantee of due process; then challenge to the constitutionality of said statutory provision is hereby lodged for this Court to adjudicate.

IV.

CLAIM FOR REFUND CANNOT BE AN ALL PERVASIVE REQUIREMENT

8. To conclude that the pre-filing of a "Claim for Refund" is all pervasive would, ipso facto, create a conflict with other satutory provisions where refunds and credits are made for specific reasons, other than overpayments.

9. Refunds for Tentative Carryback Loss, pending the statutory 3 years for final audit, would have to be declared illegal without a duly pre-filed Claim for Refund, if the latter is declared to be all pervasive. Other taxpayers would be affected.

10. Operating Loss carryback and carried forward, creating credits which are used as "constructive payments" for taxes due, would have to be declared illegal, without a duly pre-filed Claim for Refund, if the latter is all pervasive, without exceptions. Countless other taxpayers would be in limbo.

11. It is evidentially clear that Plantiffs have correctly and successfully executed the statutory provisions for Tentative Carryback Loss, and for Operating Loss carried back and carried forward.

12. Defendant, (IRS District Counsel) reliance on the presumed unimpeachable "license" grant of 26 U.S.C. § 7422(a)(1986) should be summarily denied.

13. The lower court's acceptance of the all pervasiveness of the Claim for Refund, should also be rejected forthwith.

V.

EXCLUSION OF EXCULPATORY EVIDENCES — A PATENT DENIAL OF DUE PROCESS

14. The total tax deficiences of $76,800.35 for 1978 and
$42,565.06 for 1979
or a total of $119,365.41 as established by the Tax Court, affirmed by the United States Court of Appeals for the Ninth Circuit, accepted by the United States Court of Claims, and affirmed by the Court of Appeals for the Federal Circuit has finally been admitted by Defendant (IRS) to be flawed, and inaccurate.

15. In a Notice sent to Plaintiffs, dated August 19, 1991, the deficiency for 1978 of $76,800.35 was stricken; and instead, a refund of $3,379.73 to apply to the deficiency for 1979 was entered. (See IRS Notice Aug. 19, 1991, Exhibit F, page 24.)

16. The now adjusted and corrected deficiency amounted to only $39,185.33 for only 1979 ($42,565.06 — 3,379.73 = $39,185.33)

Even this amount of $39,185.33 should have been abated by the 1985 NOL (Net Operating Loss) of $3 million.

17. For the now corrected deficiency for 1979 of only $39,185.33, which amount, as stated above, should have been abated, the total illegal seizures by the IRS at the time of the Petition to the Claims Court amounted to:

Shizuko Yamamoto's assets	$218,277.53
Hirotoshi Yamamoto's assets	32,011.26
Total	$250,288.79

(See IRS Seizures, Exhibit H, page 26.)
The illegal seizures have been ongoing, with the latest seizure being taxpayers' residence.

SUMMARY ARGUMENT

18. In response to the Claims Court's three grounds for dismissal for lack of jurisdiction, we submit categorically as follows:

**** (1) failed to "duly file" a refund claim.
Response:
Plaintiff's action is not a Claim for Refund per se, but a Petition for Redress of the breach of their Constitutional right to "due process." The restitution sought is therefore a remedy, and not the cause of action.

**** (2) failed to pay the tax due with respect to the 1979 tax year.
Response:
The 1979 additional taxes due, as corrected by IRS, amounted to only $39,185.33, which amount should have been abated by the 1985 Net Operating Loss (NOL) of more than $3 million.

**** (3) failed to wait until the Tax Court's decision became final before filing present suit.
Response:
This allegation is in total ERROR! Taxpayers did wait until the Tax Court's decision became final before filing suit.
By the Court's own recitation of the facts, on page 2 of Opinion, we cite:

> "On December 1, 1989, the Ninth Circuit Court affirmed the Tax Court opinion —
> "Plaintiffs then filed this suit on December 28, 1989.
> (Underscoring supplied)

Any charge at all for premature action should have been cited by the Court against the IRS, which commenced with their illegal seizures way before the Tax court's decision became final.

19. It is highly inconceivable and definitely an affront to our sensitivity to the Constitutional guarantees of "due process" that Defendant (IRS) should have been cloaked with the statutory privilege under 26 U.S.C. § 7422(a)(1986) to preemptorily, surreptitiously, and with total disregard for legality, to wrongfully seize taxpayer's assets in total defiance of the Fifth and Fourteenth Amendments to the U.S. Constitution.
For it is patently clear that the only recourse taxpayers have is the after the fact filing of a Claim for Refund; the filing of which must be duly made, or the consequence would be irreparable and unretrieveable loss.

20. It is clearly manifested in the case at hand, that the abuse of taxpayers' right to "due process" was totally ignored by the lower courts in deference to this errant statutory provision. Where even to enter and search, a Court issued warrant must be obtained; therefore 26 U.S.C. § 7422(a)(1986) must be declared unconstitutional, for its grant of unsupervised search and seizure powers to the IRS. This is the gravaman of the case at bar.

CONCLUSION

For the facts and reasons stated above, Petitioners respectfully pray that this Court shall issue the Writ of Certiorari forthwith. And that the case be remanded back to the lower Court for satisfaction of the Judgment of Restitution, costs and damages as provided for by law.

DATED: Honolulu, Hawaii, February 18, 1992.

HIROTOSHI YAMAMOTO, pro se
for Plaintiff-Appellant

APPENDIX

Exhibit		Page
A.	Application for Tentative Refund (1045)	13, 14
B.	IRS Check for Loss Carryback of $91,845.45 which included interest of $47,388.09	15
C.	1985 Amended Return (1040X), $3 million NCL	16, 17
D.	United States Court of Appeals for Ninth Circuit Judgment, December 1, 1989	18
E.	U.S. Claims Court Order, April 29, 1991	19
F.	IRS — Notice of Correction of Taxes for 1978-1979	24
G.	U.S. Court of Appeals for Federal Circuit affirmed Decision of Claims Court November 22, 1991	25
H.	IRS illegal seizures	26

Form **1045** (Rev. November 1981)
Department of the Treasury
Internal Revenue Service

Application for Tentative Refund

(See instruction C for when to file)

Do Not Attach to Your Income Tax Return—File Separately to Expedite Processing

▶ For use by taxpayers other than corporations.

OMB No. 1545-0098
Expires 10-31-82

[24-]

Please type or print

Name: Hirotoshi & Shizuko Yamamoto

Employer identification number: 99-0073375

Number and street: 1942 Judd Hillside

Your social security number: 576 07 1601

City or town, State and ZIP code: Honolulu, Hi. 96822

Spouse's social security number: 576 20 4935

1 Return for year of net operating loss, unused investment credit, unused WIN credit, unused jobs credit, unused research credit, or overpayment under section 1341(b)(1) ▶	(a) Tax year ended	(b) Date filed	(c) Service center where filed
	1981	4/5/82	Fresno, California

2 This application is filed to carryback: ▶	(a) Net operating loss (from page 2, line 10)	(b) Unused investment credit	(c) Unused WIN credit	(d) Unused jobs credit	(e) Unused research credit
	$196,882.99	$	$	$	$

3 (a) Preceding tax year(s) affected by carryback	(b) Did owner file a corporate return?	(c) Service center where return(s) filed (City and State)
3d 1978	☐ Yes ☒ No	Fresno, Ca.
2d 1979	☐ Yes ☒ No	" "
1st 1980	☐ Yes ☒ No	" "

4 If you changed your accounting period, give date permission to change was granted ▶

5 Have you filed a petition in Tax Court for the year or years to which the carryback is to be applied? ☒ Yes ☐ No

Computation of Decrease in Tax	3d preceding tax year ended ▶ 1978		2d preceding tax year ended ▶ 1979		1st preceding tax year ended ▶ 1980	
	(a) Before carryback	(b) After carryback	(a) Before carryback	(b) After carryback	(a) Before carryback	(b) After carryback
6 Adjusted gross income as last determined	67,463.13	67,463.13	134,968.39	134,968.39	18,730.73	18,730.73
7 Net operating loss deduction after carryback (See instructions—Attach computation)		63,857.72		132,464.34		620.88
8 Subtract line 7 from line 6	67,463.13	3,605.41	134,968.39	2,504.	18,730.73	18,109.85
9 Deductions (see instructions)	2,105.41	2,105.41	504.	504.	11,085.39	11,085.39
10 Subtract line 9 from line 8	65,357.72	1,500.	134,464.39	2,000.	7,645.34	7,024.46
11 Exemptions	1,500.	1,500.	2,000.	2,000.		
12 Taxable income (subtract line 11 from 10)	63,857.72	-0-	132,464.39	-0-	7,645.34	7,024.46
13 Income tax	22,468.54	-0-	59,312.72	-0-	638.16	547.66
14 Foreign tax credit						
15 Investment credit (see instruction H)						
16 WIN credit (see instruction H)						
17 Jobs credit (see instruction H)						
18 Research credit (see instruction H)						
19 Other credits (identify) Political Contrib					100.00	100.00
20 Total credits (add lines 14 through 19)						
21 Subtract line 20 from line 13	22,468.54		59,312.72		538.16	447.66
22 Tax from recomputing prior-year investment credit						
23 Minimum tax	14,881.35					
24 Alternative minimum tax						
25 Self-employment tax						
26 Other taxes						
27 Total tax liability (add lines 21 through 26)	36,469.94	-0-	59,312.72	-0-	538.16	
28 Enter amount from line 27 column (b)	-0-					
28 Enter amount from line 27 column (d)			-0-			
28 Enter amount from line 27 column (f)					447.66	
29 Decrease in tax (subtract line 28 from 27)	36,469.94		59,312.72		90.50	
30 Overpayment of tax due to a claim of right adjustment under section 1341(b)(1)—attach computation (see instruction I)						90,273.16

GOVERNMENT EXHIBIT 8

Under penalties of perjury, I declare that I have examined this application (including any accompanying schedules and statements), and to the best of my knowledge and belief, it is true, correct, and complete.

Hirotoshi Yamamoto 12/22/82
(Your signature and date)

Shizuko Yamamoto 12/22/82
(If application is filed jointly, both you and your spouse must sign) (Spouse's signature and date)

EXHIBIT - A

1045

EXHIBIT — A

Schedule A (Form 1045)—Computation of Net Operating Loss

1 Adjusted gross income from Form 1040, line 32a (estates and trusts—see instructions)			1	(173,473.80)
2 Deductions (applies to individuals only):				
a Enter amount from Form 1040, line 32b	2a	23,667.32		
b Do you [illegible] Form 1040, if you checked Filing Status box . . . (If 2 or 5, enter $3,400; If 1 or 4, enter $2,300; If 3, enter $1,700)	2b	3,400.00		
c Multiply $1,000 by the total number of exemptions on Form 1040, line 6e	2c	3,000.00		
d Add lines 2a through 2c (estates and trusts, enter zero)			2d	(30,067.32
3 Combine lines 1 and 2d			3	(203,541.12)
Note: If result is zero or more, do not complete rest of schedule. You do not have a net operating loss.				
Adjustments:				
4 Exemptions from line 2c above, or your tax return	4	3,000.00		
5 Enter your 60% capital gain deduction from Schedule D, Form 4798, or that was excluded from Form 1040, line 13	5	3,658.13		
6 a Enter the excess of your nonbusiness capital losses over your nonbusiness capital gains	6a			
b Enter the excess of your business capital losses over your business capital gains plus nonbusiness capital gains not used in figuring line 6(c)	6b			
c Enter total of lines 6(a) and 6(b) but not more than your capital loss limitation	6c			
7 Net operating loss deduction from other years	7			
8 a Nonbusiness deductions	8a			
b Nonbusiness income plus the excess of your nonbusiness capital gains over your nonbusiness capital losses	8b			
c Subtract line 8b from line 8a. If 8b is more than 8a, enter zero	8c			
9 Add lines 4, 5, 6c, 7, and 8c			9	6,658.13
10 Combine lines 3 and 9. This is your net operating loss. Enter here and on page 1, line 2a			10	196,882.99
Caution: If the amount to be entered on line 10 is zero or more, you do not have a net operating loss.				

Instructions for Schedule A (Form 1045)—Computation of Net Operating Loss

Use this schedule to figure your net operating loss that is available for carryback or carryforward.

Line 1.—Individuals, enter your adjusted gross income from Form 1040, line 32a. Estates and trusts, enter your taxable income from your appropriate tax return.

Line 6.—If your business capital gains plus your nonbusiness capital gains not used in figuring line 6(c) exceed your business capital losses, enter zero on line 6(b). If you have a net capital loss for the year, do not include in line 6(c), your net capital loss not allowed this year because of the capital loss limitation. For more information, see regulations section 1.172-3 and Publication 535, Business Expenses and Operating Losses.

Line 8(a) and 8(b).—Nonbusiness income and deductions are those not connected with a trade or business.

Your zero bracket amount from line 2(b), above, is allowed as a nonbusiness deduction if the election to itemize deductions has not been made. Itemized deductions, if elected, are usually nonbusiness also, except for casualty loss deductions and any employee business expenses such as union dues, uniforms, tools, and educational expenses.

Salaries and wages you received are trade or business income.

Gain or loss on sale or other disposition of real or depreciable property used in your trade or business is considered business income.

Loss on the sale of accounts receivable, if such accounts arose under the accrual method of accounting in your business, is included as a business deduction.

Casualty losses and theft losses are considered attributable to your trade or business. This is true even if it involves nonbusiness property.

Your proportionate share of a partnership's income or loss is considered business income or loss.

Losses on stock in small business corporations which qualify as ordinary losses are business losses.

Shareholders of an electing small business corporation (Subchapter S) may treat their allowable pro rata share of the corporation's net operating loss as a business loss. Any share of the income or gain, other than salaries, from a subchapter S corporation is treated as nonbusiness income or gain.

Loss resulting from the sale or exchange of small business investment company stock which qualifies as an ordinary loss, is considered as a loss attributable to your trade or business.

The deduction allowed for payments made by a self-employed person to a retirement plan is treated as a nonbusiness deduction.

EXHIBIT-A cont.

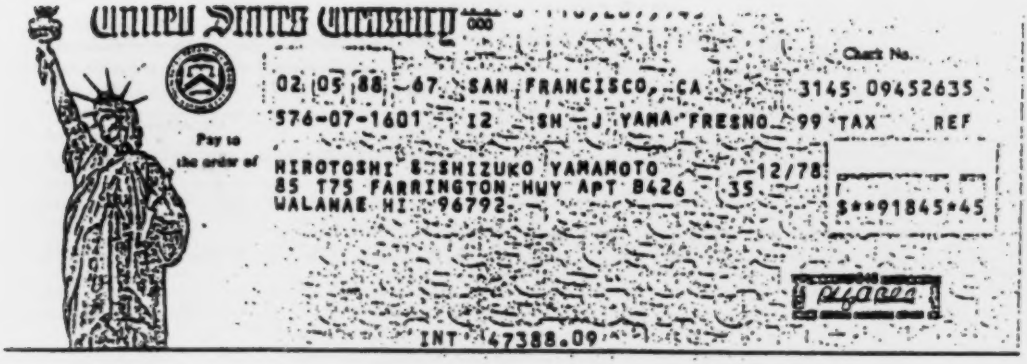

United States Treasury
Check No.
02 05 88 67 SAN FRANCISCO, CA 3145 09452635
576-07-1601 I2 SH J YAMA FRESNO 99 TAX REF
Pay to the order of
HIROTOSHI & SHIZUKO YAMAMOTO 12/78
85 T75 FARRINGTON HWY APT B426 35
WALANAE HI 96792
$**91845*45
INT 47388.09

EXHIBIT - B

Form **1040X** (Rev. October 1986) (D)

Department of the Treasury—Internal Revenue Service

Amended U.S. Individual Income Tax Return

OMB No. 1545-0091
Expires 4-30-88

This return is for calendar year ▶ 1985 , OR fiscal year ended ▶ , 19

Please print or type

Your first name and initial (if joint return, also give spouse's name and initial)	Last name	Your social security number
HIROTOSHI and SHIZUKO	YAMAMOTO	576 07 1601
Present home address (number and street or rural route). (If you have a P.O. Box, see instructions.)		Spouse's social security number
85-175 Farrington Hiway B 426		576 20 4935
City, town or post office, state, and ZIP code		Telephone number (optional)
Honolulu, Hi 96792		(808 6968531

Enter below name and address as shown on original return (if same as above, write "Same"). If changing from separate to joint return, enter names and addresses used on original return. (Note: You cannot change from joint to separate returns after the due date has passed.)

same

a Service center where original return was filed

b Has original return been changed or audited by IRS? ☑ Yes ☐ No
If "No," have you been notified that it will be? ☐ Yes ☐ No
If "Yes," identify IRS office ▶

c Are you amending your return to include any item (loss, credit, deduction, other tax benefit, or income) relating to a tax shelter required to be registered? ☐ Yes ☐ No
If "Yes," you MUST attach Form 8271, Investor Reporting of Tax Shelter Registration Number.

d Filing status claimed. (Note: *You cannot change from joint to separate returns after the due date has passed.*)

On original return ▶ ☐ Single ☑ Married filing joint return ☐ Married filing separate return ☐ Head of household ☐ Qualifying widow(er)
On this return ▶ ☐ Single ☑ Married filing joint return ☐ Married filing separate return ☐ Head of household ☐ Qualifying widow(er)

Income and Deductions		A. As originally reported or as adjusted (see instructions)	B. Net change—Increase or (Decrease)—explain on page 2	C. Correct amount
1 Total income (see instructions)	1	3,551.20	-3004300.-	-3000748.80*
2 Adjustments to income (see instructions)	2	--		
3 Adjusted gross income (subtract line 2 from line 1)	3	3,551.20		
4 Deductions (see instructions)	4	- 62.50		
5 Subtract line 4 from line 3	5	3,488.70		
6 Exemptions (see instructions)	6	-4,160.00		
7 Taxable income (subtract line 6 from line 5)	7	None		
Tax Liability				
8 Tax (see instructions). (Method used in col. C $3,000,748.80)	8			
9 Credits (see instructions)	9			
10 Subtract line 9 from line 8. Enter the result, but not less than zero	10			
11 Other taxes (such as self-employment tax, alternative minimum tax)	11			
12 Total tax liability (add line 10 and line 11)	12	0		0
Payments				
13 Federal income tax withheld and excess FICA and RRTA tax withheld	13			
14 Estimated tax payments	14			
15 Earned income credit	15			
16 Credits for Federal tax on gasoline and special fuels, regulated investment company, etc.	16			
17 Amount paid with Form 4868, Form 2688, or Form 2350 (application for extension of time to file)			17	
18 Amount paid with original return, plus additional tax paid after it was filed			18	
19 Total of lines 13 through 18, column C			19	
Refund or Amount You Owe				
20 Overpayment, if any, as shown on original return (or as previously adjusted by IRS)			20	
21 Subtract line 20 from line 19 (see instructions)			21	
22 AMOUNT YOU OWE. If line 12, col. C, is more than line 21, enter difference. Please pay in full with this return.			22	
23 REFUND to be received. If line 12, column C, is less than line 21, enter difference.			23	

DIRECTOR OF INTERNAL REVENUE RECEIVED EXAMINATION DIVISION

RECEIVED SERVICE CENTER NO. INTERNAL REVENUE SERVICE FRESNO, CA

Please Sign Here

Under penalties of perjury, I declare that I have filed an original return and that I have examined this amended return, including accompanying schedules and statements, and to the best of my knowledge and belief, the amended return is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which the preparer has any knowledge.

Your signature — Date — Spouse's signature (if filing jointly, BOTH must sign)

Paid Preparer's Use Only

Preparer's signature — Date — Check if self-employed ☐ — Preparer's social security no.

Firm's name (or yours, if self-employed) and address — E.I. No. — ZIP code

GOVERNMENT EXHIBIT 1

For Paperwork Reduction Act Notice, see page 1 of separate instructions.

BE SURE TO COMPLETE PAGE 2

EXHIBIT - C

1 Exemptions—yourself and spouse, 65 or over, blind	1				
2 Your dependent children who lived with you	2				
3 For tax years beginning after 1984, your dependent children who did not live with you	3				
4 Other dependents	4				
5 Total exemptions (add lines 1 through 4)	5				
6 Multiply $1,080 ($1,040, for tax year 1985; $1,000, for tax years beginning before 1985) by the number of exemptions claimed on line 5. Enter the result here and on page 1, line 6	6				

7 First names of your dependent children who lived with you and were not claimed on original return: Enter number ▶

8 For tax years beginning after 1984, first names of your dependent children who did not live with you and were not claimed on original return (see Instructions). (If pre-1985 agreement, check here ☐.) Enter number ▶

9 Other dependents not claimed on original return:

(a) Name	(b) Relationship	(c) Number of months lived in your home	(d) Did dependent have income of at least $1,080 ($1,040 for tax year 1985, $1,000 for tax years beginning before 1985)?	(e) Did you provide more than one-half of dependent's support?

Enter number ▶

Part II Explanation of Changes to Income, Deductions, and Credits

Enter the line number from page 1 for each item you are changing and give the reason for each change. Attach all supporting forms and schedules for items changed. Be sure to include your name and social security number on any attachments.

If the change pertains to a net operating loss carryback, a general business credit carryback, or for tax years beginning before 1986, a research credit carryback, attach the schedule or form that shows the year in which the loss or credit occurred. See the Instructions. Also, check here ▶ ☐

Loss from involuntary canfiscation of
Capital Stock of Manoa Finance Co. by
Act 187, S.L.H. 1985 and Trustee's
Reorganizatior Plan. (See Attached)

Manoa Finance	Common Stock	$2,830,300.00
" "	Preferred Stock	174,000.00
	Total Loss	$3,004,300.00

Part III Presidential Election Campaign Fund

Checking below will not increase your tax or reduce your refund.

If you did not previously want to have $1 go to the fund, but now want to . . . . . check here ▶ ☐
If joint return and your spouse did not previously want to have $1 go to the fund, but now wants to . . . . . check here ▶ ☐

EXHIBIT -C cont.

☆ U.S. GOVERNMENT PRINTING OFFICE 1985— 485-143/87-6007773

RECEIVED
JAN 0 2 1990
UNITED STATES TAX COURT

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES
JAN 0 1990
ATTY.
REPORTER
CLK.
STAT.
U.S. JUDGE
FILES

HIROTOSHI YAMAMOTO; SHIZUKO YAMAMOTO,

Petitioners-Appellants,

v.

COMMISSIONER INTERNAL REVENUE SERVICE,

Respondent-Appellee.

CA No. 87-7457

Tax Ct. No 29006-81

JUDGMENT

Upon Petition to Review a Decision of The Tax Court of the United States.....

.....

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States.....

.....

.....and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the.....

Decision of the said Tax Court of the United States in this Cause be, and hereby is AFFIRMED.....

as to Hirotoshi Yamamoto; appeal DISMISSED as to Shizuko Yamamoto.

A TRUE COPY
ATTEST DEC 27 1989
CATHY A. CATTERSON
Clerk of Court
by: Christine Hall
Deputy Clerk

GOVERNMENT EXHIBIT 6

Filed and entered December 1, 1989

EXHIBIT - D

In the United States Claims Court
No. 701-89T
(Filed April 29, 1991)

FILED
APR 29 1991
U.S. CLAIMS COURT

* *

HIROTOSHI YAMAMOTO and SHIZUKO YAMAMOTO

Plaintiffs

v.

THE UNITED STATES

Defendant.

* *

ORDER

BRUGGINK, Judge

This action concerns planitiffs' attempt to recover alleged excessive collections on tax assessments for the 1978 and 1979 tax years. Defendant has filed a motion to dismiss for lack of jurisdiction. Also pending is plantiffs' motion for summary judgment. For the reasons set out below, defendant's motion is granted and planitiffs' motion is denied.

Plantiffs filed their original complaint on December 28, 1989, and an amended complaint on June 6, 1990. The amended complaint relates to the same tax years that are at issue in the original complaint. Defendant contends that both the original complaint and the amended complaint should be dismissed because plaintiffs: (1) failed to "duly file" a refund claim; (2) failed to pay the tax due with respect to the 1979 tax year; and (3) failed to wait until the Tax Court decision became final before filing the present suit. For the reasons which follow, the court concludes that plantiffs failed to duly file a refund claim, and thus, the court lacks jurisdiction over their claim.* Defendant's motion to dismiss is granted.

BACKGROUND

On May 15, 1979, plaintiffs filed their 1978 income tax return (Form 1040) with the Internal Revenue Service ("IRS"), and on April 15, 1980, plaintiffs filed their 1979 income tax return. The IRs then mailed to plaintiffs a notice of deficiency with respect to both the 1978 and 1979 tax years. Subsequent to that notice, plaintiffs filed a petition in the Tax Court, challenging the asserted 1978 and 1979 deficiencies. The Tax Court entered a decision unfavorable to plaintiffs on August 10, 1987. Judge Sterrett found deficiencies for 1978 of $76,800.35 and for 1979 of $42,565.06, or a total deficiency of $119,365.41. Plaintiffs appealed the Tax Court decision to the Court of Appeals for the Ninth Circuit. On December 1, 1989, the Ninth Circuit affirmed the Tax Court opinion as it related to plaintiff Hirotoshi Yamamoto and dismissed the appeal as it related to plaintiff Shizuko Yamamoto. Plaintiffs then filed this suit on December 28, 1989.

The Certificate of Assessments and Payments, dated August 31, 1990, indicates that the plainfiffs have not paid over $40,000 in taxes assessed against them for 1979. The Certificate indicates that plaintiffs have paid all taxes assessed against them for 1978.

---

*While defendant's second and third grounds for dismissing the law suit appear to have merit it is unnecessary to address them. There is an independant basis for dismissing the entire action.

In 1982 plaintiffs filed an "Appliation for Tentative Refund" (Form 1045), in which they claimed a loss carryback to 1978, 1979 and 1980, with respect to an alleged 1981 loss. On February 14, 1983, the IRS sent the plaintiffs two notices which indicated allowance of the application for 1978 and 1979. As to the 1978 tax year, plaintiffs received the allowance claimed, plus interest. As to tax year 1979, plaintiffs were allowed a credit of $7,987.42, which was applied to 1978, and refunded. Subsequent to the issuance of those refunds, the IRS determined that allowance of the carryback was erroneous, and, in effect, cancelled the prior abatemer s. Plaintiffs' complaint alleges, inter alia, that the IRS then collected taxes, including monies attributable to the prior allowance, and seized property in excess of the 1978 and 1979 tax deficiencies determined by the Tax Court.

On September 9, 1987, plaintiffs filed an "Amended U.S. Individual Income Tax Return" (Form 1040X) alleging a 1985 "Involuntary Conversion Loss" of three million dollars. The original tax return for 1985 indicated no tax liability. Plaintiffs' complaint also alleges that they are entitled to a tax refund for a loss carryback or carryforward from the 1985 involuntary conversion loss against taxes found due and payable by the Tax Court.

DISCUSSION

Defendant first contends that plantiffs failed to "duly file" a claim for refund with the IRS with respect to the alleged excessive collections on the assessments for the 1978 and 1979 tax years, and therefore that the court lacks jurisdiction to hear this suit. Plantiffs counter that their "Application for Tentative Refund" (Form 1045) satisfies jurisdictional prerequisites.

Pursuant to 26 U.S.C. § 7422(a) (1986), the filing of a timely claim for refund is a jurisdictional prerequisite to suit. That section provides as follows:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(Emphasis added). As this court pointed out in Taylor v. United States, 18 Cl. Ct. 713 (1989), aff'd in part, rev'd in part on other grounds, 915 F.2d 1584 (Fed. Cir. 1990), "[n]o federal court may assume jurisdiction over a claim for recovery of income taxes where the plaintiff has not first filed a refund claim with IRS." Id. at 716 (citing Zuger V. United States, 834 F.2d 1009, 1010 (Fed. Cir. 1987)).

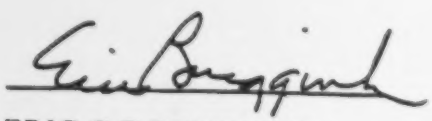
Plaintiffs erroneously argue that their appliation for tentative refund (Form 1045) filed pursuant to 26 U.S.C. § 172(b) was a duly filed claim within thc meaning of section 7422(a). Plaintiffs base their argument on the belief that section 172(b), which provides argument on the belief that section 172(b), which provides for loss carryback and carryforward, is a "special" provision and therefore overrides any "general" provision of the Internal Revenue Code. Plaintiffs ignore the difference between a jurisdictional provision (section 7422(a)) and a substantive provision (section 172(b)). If tax payers believe that they are entitled to a carryback of a net operating loss under Section 172(b), "an application for a tentative carryback adjustment of the tax" may be filed. 26 U.S.C. § 6411(a). However, section 6411(a), which establishes procedures for refund applications pursuant to section 172(b), makes clear that except for purposes of computation of interest under 26 U.S.C. § 6611(f)(3)(B), "an application under this subsection shall not constitute a claim for credit or refund." See Rock v. United States, 279 F. Supp. 96 (S.D.N.Y. 1968).

Plaintiffs also allege that they are entitled to a tax refund, pursuant to section 1033, for a loss carryback or carryforward from the 1985 involuntary conversion loss to the taxes found due and payable by the Tax Court. However, plaintiffs do not contend that they filed a claim for refund or credit for any loss carryback or carryforward from 1985. They filed an "Amended U.S. Individual Income Tax Return" (Form 1040X) on September 9, 1987. But that form merely amends plaintiffs' original 1985 tax return to add the alleged involuntary conversion loss. It is not a claim for refund or credit.

Because neither the application for tentative refund nor the amended income tax return for the alleged 1985 involuntary conversion loss is a claim for credit or refund for either the 1978 or 1979 tax years, the court has no jurisdiction to decide this case.

CONCLUSION

For the reasons expressed above, the defendant's motion to dismiss for lack of jurisdiction is granted. The Clerk is directed to enter judgment dismissing the complaint. No costs.



ERIC G.F BRUGGINK
Judge

Department of the Treasury
Internal Revenue Service
FRESNO, CA 93888

Received 8/23/91

Date of this notice: AUG. 19, 1991
Taxpayer Identifying Number: 576-07-1681
Form: 1040 Tax Period: DEC. 31, 1978

HIROTOSHI & SHIZUKO YAMAMOTO
85 248 A FARRINGTON HWY
WAIANAE HI 96792

For assistance you may call us at:
541-1040 ISLAND OF OAHU
1-800-829-1040 OTHER HI

(IRS NOTICE - Aug. 19,1991)

Or you may write to us at the address shown at the left. If you write, be sure to attach the bottom part of this notice.

OVERPAID TAX APPLIED TO
OTHER FEDERAL TAXES OWED

OUR RECORDS SHOW YOU OWED OTHER FEDERAL TAXES, SO $3,379.73 OF THE OVERPAID TAX ON YOUR TAX RETURN FOR THE ABOVE YEAR HAS BEEN APPLIED TO THE UNPAID AMOUNT. THE FIGURES BELOW SHOW THE AMOUNT OF ANY REFUND DUE YOU.

YOU MAY HAVE RECENTLY MADE A PAYMENT ON THE TAXES YOU OWED AND IT WAS NOT CREDITED TO YOUR ACCOUNT WHEN YOUR OVERPAID TAX WAS APPLIED, OR YOU MAY STILL HAVE A REFUND DUE FOR THE ABOVE TAX YEAR. IF SO A CHECK WILL BE SENT TO YOU FOR THE TOTAL AMOUNT DUE YOU IF IT IS MORE THAN $1. HOWEVER, IF THE AMOUNT DUE YOU IS LESS THAN $1, IT WILL BE SENT TO YOU ONLY IF YOU ASK FOR IT.

TAX STATEMENT

YOUR OVERPAID TAX ON RETURN.....		$3,379.73
AMOUNT OF OVERPAID TAX APPLIED..	$3,379.73	
AMOUNT OF INTEREST APPLIED.....	$.00	
TOTAL AMOUNT APPLIED (SEE BELOW).....		$3,379.73
AMOUNT TO BE REFUNDED TO YOU..... (ANY INTEREST DUE YOU WILL BE ADDED)		$.00

HOW YOUR OVERPAID TAXES WERE APPLIED

FORM(S)	TAX PERIOD(S)	AMOUNT(S) APPLIED
1040	DEC. 31, 1979	$3,379.73

To make sure that IRS employees give courteous responses and correct information to taxpayers, a second IRS employee sometimes listens in on telephone calls.

Keep this part for your records

Overlay 8 Form 8489 (Rev. 11-8)

Return this part to us with your check or inquiry

Your telephone number
( ) -

Best time to call

576071601 TZ 0000 30 0 7812

INTERNAL REVENUE SERVICE
FRESNO, CA 93888

EXHIBIT - F

HIROTOSHI & SHIZUKO YAMAMOTO
85 248 A FARRINGTON HWY
WAIANAE HI 96792

9132 89247-528-79007-0

EXHIBIT — F

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

91-5113

HIROTOSHI YAMAMOTO,
Plaintiff-Appellant,
and
SHIZUKO YAMAMOTO,
Plaintiff,

v.

THE UNITED STATES,
Defendant-Appelle.

DECIDED: November 22, 1991

Before MAYER, Circuit Judge, COWEN, Senior Circuit Judge, and RADER, Circuit Judge.

PER CURIAM.

DECISION

Horotoshi Yamamoto appeals the judgment of the Claims Court in No. 701-89 T, dismissing his income tax refund suit for lack of jurisdiction because he did not file a timely claim for refund under 26 U.S.C. § 7422(a) (1988). We affirm on the basis of the trial court's order of April 29, 1991.

EXHIBIT — G

December 16,1989

SHizuko Yamamoto
85-175 Farrington Hwy B426
Waianae, HI 96792

Seizures by INTERNAL REVENUE SERVICE

Amount	Description	Taxpayer	Date
$18,000.00	39.258 Acres. Puna, Hawaii	575-20-4935	3/15/1989
3,942.51	Acct 86-310252 First Hawaiian B	575-20-4935	2/7/1989
1,224.90	Acct 2179133 National Funds	575-20-4935	6/26/1989
5,058.44	Cert 1400-0086 Finance Factors	575-20-4935	2/22/1989
5,006.76	C-374441 Territorial Savings	575-20-4935	3/8/1989
5,007.67	C-372512 Territorial Savings	575-20-4935	3/8/1989
10,030.00	Acct 37-0093940 American Sav	575-20-4935	3/2/1989
20,000.00	Acct 37-0094385 American Sav	575-20-4935	3/2/1989
22,355.81	712 Shares Hawaiian Elec Ind.	575-20-4935	6/6/1989
6,410.90	630 Shares Allstate Muni Inc.	575-20-4935	6/6/1989
13,333.02	1,453 Shares US GOVT SEC TRUST	575-20-4935	5/31/1989
18,024.86	351 Shares GTE Corporation	575-20-4935	6/6/1989
89,882.66	8,195 Shares Hawn Tax-Free Tr	575-20-4935	7/10/1989
$218,277.53 *			

* Funds from Shizuko's father's Estate, which were kept in guardianship for daughter Kay, who suffers from congenital palsy.

Amount	Institution	Taxpayer	Date
8,347.98	Acct 15891465 Internation Sav	575-07-1601	2/28/1989
37.50	Han P Ching, Alice K Hahn	575-07-1601	6/30/1989
22,925.78	Acct 131773 Bank of Honolulu	575-07-1601	3/24/1988
700.00	Kona Highlands Venture	575-07-1601	
$ 32,011.26 *			

* Additional seizures of Hirotoshi's assets.

$250,288.79 TOTAL SEIZURES BY INTERNAL REVENUE SERVICE

EXHIBIT - H

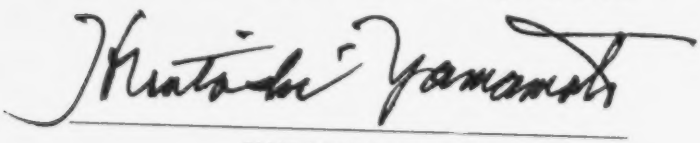
AFFIDAVIT OF SERVICE

The undersigned avers and deposes that three(3) copies of the foregoing PETITION FOR CERTIORARI have been transmitted by the United States Postal Service, postage prepaid to:

ANNETTE M. WIERECHA, Esquire
Tax Division, Dept. of Justice
P. O. Box 502
Washington, D.C. 20044

KENNETH W. STARR, Esquire
U.S. Solicitor General
Main Justice Bldg.
10th and Constitutional Avenue, N.W.
Room 5143
Washington, D.C. 20530

Dated: Honolulu, Hawaii, February 18, 1992



HIROTOSHI YAMAMOTO